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Before the  
Federal Communications Commission  
Washington, D.C. 20554

Federal Communications Commission  
Office of Secretary  
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In the Matter of )  
 )  
Implementation of the Telecommunications )  
Act of 1996 ) CC Docket No. 96-152  
 )  
Telemessaging, Electronic Publishing, and )  
Alarm Monitoring Services )

**COMMENTS OF BELL ATLANTIC<sup>1</sup> AND NYNEX<sup>2</sup> ON  
FURTHER NOTICE OF PROPOSED RULEMAKING**

I. Introduction and Summary

The Commission appropriately found that a Bell operating company ("BOC") is engaged in the provision of electronic publishing and is subject to the requirements of Section 274 of the 1996 Act only if it controls, or has a financial interest in, the content of information that it disseminates over its basic telephone service.<sup>3</sup> In interpreting what constitutes "control" and "financial interest" for the purpose of implementing this finding, the Commission should keep in mind the intent of the Act and narrowly define these terms. The Commission should

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<sup>1</sup> The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

<sup>2</sup> The NYNEX Telephone Companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

<sup>3</sup> *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-35 at ¶ 49 (rel. Feb. 7, 1997) ("Order").

define “transactions” as actual agreements between a BOC and its Section 274 affiliates and require that they be made available to the Commission on request.

II. Control and Financial Interest Should Be Narrowly Defined.

The Commission should adopt its tentative conclusion not to define “control” as broadly as it is defined in Securities and Exchange Commission regulations for the purpose of determining whether one corporation controls another.<sup>4</sup> Instead, it should find that a BOC is subject to the requirements of Section 274 only when it has a sufficient equity interest in the content of the information that it can exercise control over that content, as discussed below. When the BOC can exercise no control over the content, there is no legal or policy reason to subject it to the structural and non-structural requirements of Section 274 that are designed to prevent abuse of that control.

“Control” is not normally imputed unless a stakeholder has an ultimate right to make decisions regarding the subject matter--in this case decisions regarding what content is to be created and how it is to be managed and presented.<sup>5</sup> When a BOC does not have a significant ownership interest, it most certainly would not have such ultimate decision-making authority. Any input it would have regarding content would be merely suggestive, and certainly not sufficient to be labeled as a “publisher” of anything. What constitutes control will vary

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<sup>4</sup> *Id.* at ¶ 243.

<sup>5</sup> *See, e.g., Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 74 F.3d 20 (1st Cir. 1996), citing *Schloegel v. Boswell*, 994 F.2d 266, 271-72 (5th Cir. 1993) (“Mere influence over the trustee’s investment decisions ... is not effective control over plan assets.”)

depending upon the particular arrangement, but it often will require a majority ownership interest in such content.<sup>6</sup>

The Commission also asks whether “control” should alternatively be broadly interpreted to include the ability of a BOC, when acting as a gateway provider, to limit the types of information to which the gateway connects.<sup>7</sup> The Commission has already decided this issue in this docket in the context of Internet access. First, it found that a BOC is not engaged in electronic publishing when it provides introductory gateway content and hypertext links and pointers to certain Internet websites, because such content and pointers fall within the “gateway” and “navigational system” exception to the definition of electronic publishing under Section 274(h)(2)(C).<sup>8</sup> Second, the Commission found that a BOC is subject to Section 274 only when it disseminates the information via its basic telephone service.<sup>9</sup> When the BOC is providing Internet access, it is providing users with access to information; it is *not* disseminating the information over its own basic telephone service.<sup>10</sup> Accordingly, it is not engaged in the provision of electronic publishing.<sup>11</sup>

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<sup>6</sup> In any event, the Commission should not find that a BOC can exercise control over content when it has less than a 10% equity interest in the entity that publishes the content.

<sup>7</sup> Order at ¶ 244.

<sup>8</sup> *Id.* at ¶ 46.

<sup>9</sup> *Id.* at ¶ 54, citing Section 274(a).

<sup>10</sup> “Basic telephone service” is limited to wireline service provided within a telephone exchange area. *See* 47 U.S.C. § 274(i)(2), Order at ¶ 54.

<sup>11</sup> A BOC could, of course, offer a specialized gateway service for specific types of databases, such as those containing medical information, without engaging in electronic publishing.

Similarly, the Commission should define “financial interest” to mean a significant ownership interest in the content, as discussed above in the context of control.<sup>12</sup> At a minimum, such a financial interest should effectively translate to a right to receive at least 10 percent of the gross revenues of the entity that publishes the content. This is similar to the threshold Congress set out in Section 274(i)(8) for deciding whether a BOC’s ownership of another entity that is engaged in electronic publishing is sufficient to trigger the separate subsidiary requirements of Section 274.

III. Only Actual Agreements Between the BOC and Section 274 Entities Constitute Transactions Under Section 274(b)(3).

The Commission also seeks comment on the meaning of “transaction” for purposes of Section 274(b)(3).<sup>13</sup> As the Commission suggests, that definition should parallel the definition it adopted in connection with the comparable provision in Section 272(b)(5).<sup>14</sup> As it found in interpreting that provision, in order for there to be a “transaction” there must be an actual agreement between the BOC and a Section 274 entity. A mere request, or a routine

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<sup>12</sup> Even if a BOC owned content, it would not be engaged in the provision of electronic publishing under Section 274 if its role were limited to licensing the content to another party that independently decides to publish it.

<sup>13</sup> Order at ¶ 251.

<sup>14</sup> *Id.*, citing *Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order*, CC Docket No. 96-150, FCC 96-490 at ¶ 124 (rel. Dec. 24, 1996) (“Accounting Safeguards Order”).

interaction between the BOC and its affiliate, does not become a transaction unless there is an actual agreement to provide the other with something of value.<sup>15</sup>

The Commission also asks the proper interpretation of the statutory requirements that agreements must be “filed with the Commission” and “made publicly available.”<sup>16</sup> The goal of the Act can be fully achieved by requiring that all transactions between a BOC and its Section 274 entities be fully documented (either pursuant to a written contract or a tariff), retained by the Section 274 entity, and made available to the Commission on request<sup>17</sup> and in connection with the annual compliance review required by Section 274(b)(8). The Commission asks whether the requirement of public availability applies only to tariffs or to all transactions.<sup>18</sup> It should find that the public availability language of Section 274(b)(3) applies only to tariffs for telecommunications services. If it finds, however, that all contracts involving BOC-274 entity transactions must be made publicly available, the Commission should find that this requirement may be met by making the contracts available for inspection upon reasonable request at the BOC’s principal place of business, with a brief reference posted on the Internet, as it has for transactions between a BOC and its Section 272 affiliate.<sup>19</sup> As provided under the Computer Inquiry II rules, the contracts should be made available within 30 days after they are signed.<sup>20</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Order at ¶¶ 248-50.

<sup>17</sup> This is the current requirement for transactions between a BOC and a cellular affiliate other than those related to interconnection. *See* 47 C.F.R. § 22.903(d).

<sup>18</sup> Order at ¶ 249.

<sup>19</sup> Accounting Safeguards Order at ¶ 122.

<sup>20</sup> 47 C.F.R. § 64.702(c)(5).

The Commission should not, however, require a separate certification statement of a BOC officer for each contract, as it proposes.<sup>21</sup> The contracts themselves will be signed by authorized representatives of the parties, and a separate certification of their validity would serve no regulatory purpose.

IV. BOC Telecommunications Services Provided to Section 274 Entities Must Be Offered Under Tariff, So Long As The Rates Remain Regulated.

Finally, the Commission should adopt its tentative conclusion that network access and interconnections for basic telephone service addressed in Section 274(d) may be carried out only pursuant to tariff (so long as such rates are subject to regulation).<sup>22</sup> When the service is tariffed, no additional written contract is required under Section 274(b)(3), nor does the transaction trigger any additional filing requirement under that provision.

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<sup>21</sup> Order at ¶ 250.

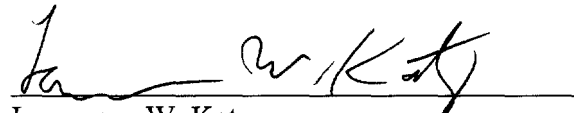
<sup>22</sup> *Id.* at ¶ 251.

V. Conclusion

Accordingly, the Commission should adopt the rules and statutory interpretations proposed herein.

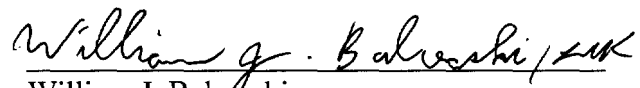
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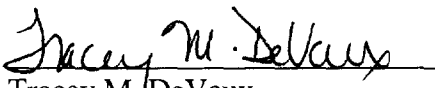
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April 4, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 1997 a copy of the foregoing "Comments of Bell Atlantic and NYNEX on Further Notice of Proposed Rulemaking" was served by hand on the parties on the attached list.

  
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